Cornell Law Review

Volume 54
Issue 3 *February 1969*

Article 4

Application of Article 85 (3) of the Treaty Establishing the European Economic Community to Exclusive Dealing Agreements

David M. Cohen

THE APPLICATION OF ARTICLE 85(3) OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY TO EXCLUSIVE DEALING AGREEMENTS

David M. Cohen†

Each nation that became a party to the Treaty Establishing the European Community[1] did so, in part, because of the belief that substantial economic advantages would result from economic integration. Each nation realized that the fusion of the national markets of the parties would enable enterprises located within these markets to take advantage of economies of scale and also would subject them to increased pressure to innovate and to become more efficient.

The vast majority of the articles contained in the EEC Treaty are designed to obligate the members of the Community to remove state barriers to trade between their national markets. However, the member states realized that the goals of the Community would not be achieved if the fusion of the national markets were to be frustrated by the replacement of state barriers to trade by private restrictive practices. Thus, the treaty also contains rules designed to prevent private action that would frustrate the integration of the national markets.[2]

Article 85 is one of the principal articles included in the treaty to deal with private restrictive practices. This article contains a prohibition of certain practices[3] coupled with an exemption for certain other types of practices.[4] This study is concerned with the exemption provision contained in article 85(3) and its application to exclusive dealing agreements.

The first part of this study is composed of a discussion of the anti-competitive and pro-competitive effects of exclusive dealing agreements. The second part is concerned with article 85, and includes a discussion of the setting in which the article appears, the derivation of the article and, finally, a brief note concerning the implementation of

---

† Associate Professor of Law, University of Pittsburgh. B.A. 1962, J.D. 1964, University of Illinois.

1 Hereinafter referred to as either the treaty or the EEC Treaty.

All translations of the treaty are from the version reproduced in E. STEIN & P. HAY, DOCUMENTS FOR LAW AND INSTITUTIONS IN THE ATLANTIC AREA 75 (1967).

2 These rules are contained principally in EEC Treaty. *Id.* arts. 85, 86.

3 *Id.* art. 85(1).

4 *Id.* art. 85(3).

the article by the Community institutions.[5] The final portion of this study examines article 85, paragraph 3 in detail, and discusses Commission decisions, decisions of the Court of Justice, and the regulation applying article 85(3) to certain groups of exclusive dealing agreements.

I

THE EFFECTS OF EXCLUSIVE DEALING AGREEMENTS

There are two basic types of exclusive dealing agreements: (*1*) An exclusive sales agreement pursuant to which the seller agrees to supply the goods covered by the contract exclusively to one purchaser located within a designated territory (hereinafter referred to as the "contract territory"); (*2*) an exclusive purchase agreement pursuant to which the buyer agrees to purchase all of his requirements for the goods covered by the contract from the seller.[6] Each type of agreement may have either anti-competitive or pro-competitive effects depending upon its economic setting.

An exclusive sales agreement obviously restricts competition with the exclusive dealer. If a potential competitor located within the contract territory desires to sell the contract goods in competition with the exclusive dealer, he must obtain the goods indirectly from a third party. The purchase of the goods from a third party will raise the price of the goods to the dealer's competitor to some point above the price paid by the exclusive dealer. Unless the dealer's competitor is more efficient than the exclusive dealer, or unless the demand for the goods within the contract territory is so great in relation to the supply that consumers will purchase at a price higher than that charged by the exclusive dealer, the additional costs incurred by the dealer's competitor will prevent him from selling the goods at a price competitive with that charged by the exclusive dealer.

If a potential competitor located without the contract territory wishes to compete with the exclusive dealer, he will be required to induce consumers to leave the contract territory (thereby increasing the price of the goods to the consumer by the costs incurred in leaving the territory) or he will be required to dispatch salesmen into the contract territory. If the contract territory is defined to encom-

[5] There are four principal Community institutions: The Commission, *see* 1 CCH COMM. MKT. REP. ¶¶ 4472-544 (1968); the Court of Justice, *see id.* ¶¶ 4600-872; the Council, *see id.* ¶ 121.67; and the Assembly, *see id.* ¶ 121.65.

[6] *See* Reati, *Exclusive Dealing and Market Integration*, 6 J. COMM. MKT. STUDIES 131 (1967) [hereinafter cited as Reati].

pass a large enough area, the dealer's competitor will incur greater costs than those incurred by the exclusive dealer. Again, unless the potential competitor is more efficient than the exclusive dealer or unless consumers will continue to purchase the goods at a price higher than that charged by the exclusive dealer, the dealer's competitor will be unable to sell the goods at a price that is competitive with the price at which the exclusive dealer sells the goods.

Thus, whether the dealer's competitors are located within or without the contract territory, the exclusive dealer is free to increase the price for the contract goods to the point at which it becomes profitable for potential competitors located within the contract territory to purchase the goods for resale from a third party or for potential competitors located without the contract territory either to induce consumers to leave the territory or to dispatch salesmen to the contract territory. The seller may increase this pricing freedom by granting the exclusive dealer increased territorial protection. For example, if the seller has concluded a number of exclusive selling agreements, he may require each exclusive dealer to refrain from soliciting customers located outside the contract territory allocated to him.[7] Alternatively, the seller may require each exclusive dealer to pay a certain percentage of the sale price if he effects a sale in a contract territory allocated to another dealer.[8] This sum may be paid either to the seller or to the exclusive dealer in the contract territory where the sale was effected. Finally, the seller may require each exclusive dealer to refuse to supply any customer who does not possess a place of residence in the contract territory allocated to him.[9]

An exclusive purchasing agreement may restrict competition with the seller. If the purchaser has undertaken an obligation to purchase all of his requirements from the seller, he will obviously not be in a position to purchase goods from competitors of the seller. Thus, competitors of the seller are precluded from competing for the sale of goods to the exclusive dealer.[10] If the seller has a great number of exclusive purchasing agreements, competitors may be severely hampered in locating outlets for their goods. This may be true even if the seller does not possess a great number of exclusive dealers. For example, if the location of the dealer is important, as in gasoline service stations

7 This has been referred to as "simple" territorial protection. *Id.* at 132.

8 This has been referred to as "reinforced" territorial protection. *Id.*

9 This has been referred to as "complete" territorial protection. *Id.*

10 *See* Fulda, *The Exclusive Distributor and the Anti-trust Laws of the Common Market of Europe and the United States*, 3 TEXAS INT'L L.F. 209, 210 (1967) [hereinafter cited as Fulda].

or roadside restaurants, competitors of the seller may be in a position to locate outlets for their goods but these outlets may not be as effective as those possessed by the seller.

An exclusive sales agreement may create pro-competitive effects. If a seller desires to introduce a new product into a market, he may encounter difficulties in locating distributors. Dealers may be reluctant to invest funds in inventory which may not sell. They also may be of the opinion that in order to introduce the product it will be necessary to incur large advertising and market investigation expenses. In this situation, dealers may demand an exclusive sales agreement with or without increased territorial protection in order to ensure the recovery of the costs they incur in introducing the product into the market.[11]

Thus, if an exclusive sales contract serves to induce dealers to undertake the introduction of a new product into the market, the contract has the effect of increasing competition among sellers by increasing the number of competitors.

The Supreme Court of the United States has recognized the beneficial effects of exclusive purchase agreements. For example, this type of contract may enable the seller to save selling costs by enabling him to obtain a secure outlet; the dealer may be able to engage in "long-term planning on the basis of known costs . . . ."[12] Assuming that at least one reason for desiring to preserve competition is the belief that a competitive system enables the consumer to obtain the best goods at the lowest possible cost, it would appear consistent with that goal to refrain from entirely prohibiting arrangements that increase economic efficiency and that possess only minimal anti-competitive effects. Given the fact that exclusive purchasing agreements may increase efficiency, they should not be prohibited if the ability of competing sellers to locate outlets for their goods is not significantly impaired. The degree of impairment must be determined upon a case-by-case basis taking into account such factors as the number of dealers covered by exclusive purchasing contracts, the importance of location to the value of the dealer, and the duration of the contracts.[13]

Thus, exclusive selling and purchasing agreements are "Janus-faced."[14] Each type may be detrimental to competition. Each type may be beneficial in an economic sense. Whether a particular agreement is beneficial or detrimental depends upon the type of contract, the type

11 *See generally* Reati, *supra* note 6, at 140-46.

12 Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949). *See also* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

13 *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

14 Fulda, *supra* note 10, at 210.

of additional clauses included within the contract terms, and, especially, upon the economic circumstances surrounding the agreement.

II

ARTICLE 85

A. *General Setting*

The goals of the members of the Common Market are set forth in the EEC Treaty in the Preamble and in Part I. In particular, article 2 provides that the task of the Common Market is

> to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

The goals of the Community are to be achieved "by establishing a Common Market and [by] gradually approximating the economic policies of Member States."[15] That is, the drafters of the treaty were of the opinion that the elimination of tariffs and quantitative restrictions —leading to a "fusion" of the separate national markets—would have the beneficial effect of subjecting the industries located within each state to increased competitive pressure to innovate and to become more efficient. And these enterprises, by servicing a larger market, would be in a position to avail themselves of the economies of scale. These beneficial effects would provide the means whereby the Community would achieve its goals.

The language of article 2 thus appears to indicate that the formation of a common market was viewed by the drafters of the treaty as the means to an end and not as an end in itself. This position is supported by the fact that article 2 is located in Part I of the treaty, entitled "Principles," and by the *actes preparatoires*.[16]

If the formation of a common market is to be viewed solely as a

---

[15] EEC Treaty art. 2.

[16] *See* Ellis, *Source Material for Article 85(1) of the EEC Treaty*, 32 FORDHAM L. REV. 247, 249 (1963). Although Ellis refers primarily to EEC Treaty art. 85(1), the supporting material cited in the article would appear to apply to the entire treaty. Thus, he notes that the objectives of the treaty are set forth in article 2 and that the Spaak Report states: "to attain these objectives, a fusion of the separate markets is an absolute necessity." *Id.* Since the rules contained in the treaty are designed to result in a "fusion" of the national markets, it would appear that these rules must be interpreted as designed to ensure the proper functioning of the means chosen to achieve the goals of the Community. Thus, all of the rules contained in the treaty should be interpreted in light of the objectives set forth in article 2.

tool, it follows that all the provisions of the treaty should be viewed as "subordinate" to the goals of the Community as set forth in the Preamble and in Part I of the treaty and should be interpreted in light of those goals. Pursuant to this principle, each provision of the treaty should be interpreted so as to further the achievement of the "tasks" of the Community and not to hinder the achievement of those tasks. The application of this principle appears to require that when presented with the necessity of choosing between an interpretation that would further the formation of a common market but that would hinder the achievement of the Community goals and an interpretation with the opposite effect, the choice should be made in favor of the latter interpretation.

This principle of interpretation is applicable to the rules concerning competition contained in the treaty.[17] The drafters of the treaty realized that "[t]he [establishment of a] common market would not in itself lead to the most rational division of activities,"[18] or "to the general raising of the standard of living and to a more active rate of expansion."[19] They realized that "[private] enterprises . . . , owing to their size or specialization, or to the agreements they have concluded . . ." could nullify by private action the beneficial effects of the removal of state barriers to trade.[20] Thus, they recognized that the treaty would "have to lay down basic rules" on this subject.[21]

When, therefore, the strict preservation of competition comes into conflict with the goals of the Community, the achievement of the goals should take precedence and the strict preservation of competition should give way.

B. *Article 85—Language and Derivation*

The structure of the principal article of the treaty concerned with competition appears to support the view "that the rules of competition in the Treaty do not fulfill any autonomous . . . function but [exist only] . . . to ensure the realization of the positive aims of the Treaty."[22]

---

17 *See* Italy v. EEC Council & EEC Comm'n, 1961-66 CCH COMM. MKT. REP. ¶ 8048, at 7717 (EEC Ct. Just. 1966): "All of the provisions of Article 85 must therefore be considered in conjunction with the principles set forth in the preamble to the Treaty and interpreted in this light . . . ."

18 Comité Intergovernmental Créé Par La Conference De Messine, Rapport Des Chefs De Délégation Aux Ministres Des Affaires Etrangères 53-54 [hereinafter referred to as the Spaak Report], *quoted in* Ellis, *supra* note 16, at 250.

19 *Id.*

20 *Id.* at 251.

21 *Id.*

22 *Id.* at 257.

Article 85, paragraph 1, provides:

> The following shall be prohibited as incompatible with the Common Market: all agreements between enterprises, all decisions by associations of enterprises and all concerted practices which are apt to affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market . . . .

Article 85 then continues by providing in paragraph 3 for the exemption from the prohibition contained in paragraph 1 of agreements, decisions, and concerted practices that:

> [1] contribute to the improvement of the production or distribution of goods or to the promotion of technological or economic progress [2] while reserving to consumers an equitable share in the profit resulting therefrom, and which:
>
> [3] . . . neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
>
> [4] . . . nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Any agreement, decision or concerted practice that is prohibited by article 85(1) and that is not exempted from the prohibition by article 85(3) is null and void.[23]

In *Geitling v. Haute Autorite*,[24] the Court of Justice recognized the fact that "there is a common inspiration between article 65 of the ECSC [European Coal and Steel Community] Treaty and article 85 of the EEC Treaty."[25] Indeed, the language utilized in article 65(2) of the earlier treaty (the ECSC Treaty entered into force on July 24, 1952) is strikingly similar to the language found in article 85(3) of the EEC Treaty. Article 65(2) of the ECSC Treaty provides:

> [T]he High Authority shall authorize agreements to specialize in the production of, or to engage in the joint buying or selling of specified products, if the High Authority finds:
>
> (a) that such specialization or such joint buying or selling will contribute to a substantial improvement in the production or distributing of the products in question; and
>
> (b) that the agreement in question is essential to achieve these results, and is not more restrictive than is necessary for that purpose; and
>
> (c) that it is not capable of giving the interested enterprises the

---

23 EEC Treaty art. 85(2).

24 "Geitling" Ruhrkohlen-Verkaufsgesellschaft m.b.H. v. High Auth., 1 Comm. Mkt. L.R. 113 (EEC Ct. Just. 1962), *abstracted in* 2 D. VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 232 (1965).

25 *See* portion of the opinion cited in Ellis, *supra* note 16, at 254.

> power to determine prices, or to control or limit the production or selling of a substantial part of the products in question within the common market, or of protecting them from effective competition by other enterprises within the common market.[26]

Thus, when the Inter-Governmental Committee, the parent of the Spaak Report,[27] was established, the negotiating countries had been signatories, for approximately four years, to a treaty that contained a prohibition of certain anti-competitive practices together with an exemption from the prohibition for certain of those practices. However, the Spaak Report, while recognizing the need for rules prohibiting anti-competitive practices, did not recommend the inclusion of a provision similar to article 65(2) of the ECSC Treaty in a treaty establishing a common market.[28]

The failure of the Spaak Report to recommend the inclusion of an exemption provision may perhaps be explained by the economic setting in which the ECSC Treaty was concluded. Even before the conclusion of the ECSC Treaty, coal, steel, iron ore, and scrap entered three of the four customs areas (Benelux, Germany, and France) duty free.[29] Benelux tariffs on steel were relatively low and steel tariffs were wholly or partially in suspense in Germany and France.[30] The only important tariffs were the Italian tariffs on coke and steel.[31] In addition, imports of common market products were generally free from quantitative restrictions as a result of the Organization for European Economic Cooperation program of liberalization.[32] The important task before the members of the ECSC was, therefore, to establish those conditions of competition that would ensure the enjoyment of the full benefits of economic integration.[33]

This task was to prove extremely difficult. The industries to be covered by the ECSC Treaty were characterized by "private cartel arrangements between producers, state ownership, and government

---

26 There is no official English version of the ECSC Treaty. This translation is from an English version published by the High Authority of the ECSC reprinted in STEIN & HAY, *supra* note 1, at 40.

27 The Spaak Report takes its name from the Chairman of the Intergovernmental Committee established during the Messina Conference on June 1 & 2, 1955. The report "has something of an official character in that [it] . . . was accepted by the Conference of Ministers at Venice as a basis for the subsequent negotiations which took place at Val Duchesse near Brussels." Ellis, *supra* note 16, at 248.

28 *Id.* at 263.

29 CASE STUDIES IN EUROPEAN ECONOMIC UNION 200 (J. Meade ed. 1962).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

control measures," all of which served to reduce "the impact of economic forces upon the position of individual producers and of whole industries to a minimum . . . ."[34] Given the highly cartelized state of the industries encompassed by the ECSC, plus the "traditional European attitude that competition is not always desirable and that distinctions can be drawn between 'good' and 'bad' cartels,"[35] it is not particularly surprising that the negotiators of the ECSC Treaty incorporated a distinction between permissible and impermissible cartels into the treaty.

The negotiators of the EEC Treaty were attempting to integrate the entire economies of their respective nation-states (except for the products covered by the ECSC Treaty). They may have believed that due to the special history of, and the special conditions pertaining to, the coal and steel industries, some degree of cartelization was necessary in those sectors of their economies. However, they may have also believed that these conditions did not prevail in the other sectors and that, in fact, if the same degree of cartelization were to be permitted in these other sectors, the objectives of establishing a common market might never be achieved. Thus, the absence of special conditions and a special history may have combined with a desire to prevent the nullification of enlarged objectives to lead the members of the Spaak committee to omit a distinction between "good" and "bad" cartels in their report.

In any event, as noted above, the Spaak Report did not recommend the inclusion of an exemption provision and it was not until October 26, 1956 that Dr. von der Groeben, who had served with the Coal and Steel Community for many years,[36] recommended the inclusion of an exemption provision.[37] Shortly thereafter, perhaps due in part to the insistence of the French[38] (who had incorporated a provision similar in intent to article 65(2) of the ECSC Treaty into French cartel law in 1953[39]), an exemption provision very similar in wording to Dr. von der Groeben's proposal was incorporated into the draft treaty.[40] This provision became what is now article 85(3) of the EEC Treaty.

---

34 *Id.* at 201.

35 Patricelli, *Exemptions From Cartel Prohibition in the Common Market*, 7 HARV. INT'L L.J. 33, 35 (1965).

36 *Id.* at 37.

37 Ellis, *supra* note 16, at 263.

38 Buxbaum, *Anti-trust Regulation Within the European Economic Community*, 61 COLUM. L. REV. 402, 409 (1961).

39 Patricelli, *supra* note 35, at 36-37.

40 Dr. von der Groeben's proposal provided:

Agreements between enterprises and decisions by associations of enterprises

The fact that the language utilized in article 85(3) is similar to the language utilized in article 65(2) of the ECSC Treaty, when viewed in the context of the "legislative history" of article 85(3), supports the contention of the Court of Justice that the two articles are closely related. If this is so, the decision of the Court of Justice in the *Geitling* [41] case takes on additional importance. In that case, the court appeared to support the contention advanced in part II of this article[42] to the effect that the EEC Treaty rules concerning competition, primarily article 85(1), should be interpreted not as an end in themselves but as rules designed to ensure the proper functioning of the means utilized by the treaty to achieve the goals of the Community.

C. *The Implementation of Article 85*

Article 87 of the EEC Treaty empowered the Council to enact the regulations or directives that were required to implement the provisions of article 85. Pursuant to this grant of power, the Council enacted regulation 17 in 1962.[43]

This regulation is extremely complex[44] and its substantive provisions can only be briefly noted. Basically, regulation 17:

(*1*) Enabled enterprises to obtain a declaration from the Commission to the effect that an agreement was not prohibited by article

shall nevertheless be authorized (and valid) if they have been declared to the Commission (with a view to their registration) and the declarant can furnish proof that, in a manner which is equally of benefit to consumers, they help to improve the production or distribution of goods or to promote technical or economic progress, without subjecting the enterprises in question to any restrictions which are not indispensable to the achievement of these objectives and without enabling them to fix prices, limit production or markets or eliminate the competition of other enterprises in respect of a substantial part of the goods concerned.

Ellis, *supra* note 16, at 263.

41 *See* portion of the opinion quoted *id.* at 274.

42 Pp. 383-84 *supra.*

43 1 CCH COMM. MKT. REP. ¶¶ 2401-2632 (1968).

44 The complexity is due in part to the fact that the regulation is the product of a compromise between the French, who viewed agreements fulfilling the requirements of article 85(3) as never having been prohibited (the "declarative" view), and the Germans, who viewed article 85(3) as merely granting to the Commission the power to exempt agreements from the operation of article 85(1) (the "constitutive" theory). Under the declarative theory, a decision exempting an agreement would have retroactive effect. A decision exempting an agreement under the constitutive theory would not have retroactive effect. When the Commission attempted to adopt the constitutive theory, it met with considerable opposition. Hence, the compromise: Regulation 17 distinguishes between "notifiable" and "non-notifiable" agreements (a concession to the French); the Commission may grant an exemption which is retroactive in some cases to the date of notification and to a date prior to notification in others (apparently another concession to the French). *See* Patricelli, *supra* note 35, at 38-39.

85(1) (a declaration of this nature is denominated a "negative clearance");[45] (2) required enterprises, in most instances, to register their agreements with the Commission if they were of the opinion that their agreements might be prohibited by article 85(1) but might qualify for an exemption pursuant to article 85(3).[46]

Subsequent to the issuance of Council regulation 17, the Commission issued regulation 27[47] which provided that applications for negative clearances were to be filed on Form A and that notifications were to be filed on Form B. The Commission subsequently amended regulation 27 to provide that certain types of agreements were to be notified upon a simplified form denominated Form B-1.[48]

Form B-1 was to be utilized for agreements:

> [I]n which only two enterprises . . . [took] part and:
> —in which one of them . . . [undertook] vis-à-vis the other to furnish certain products exclusively to it for the purpose of resale within a defined part of the territory of the Common Market, or
> —in which one of them . . . [undertook] vis-à-vis the other to buy certain products only from it for the purpose of resale, or
> —in which exclusive obligations with respect to the supply and purchase of certain products, as described in the two preceding paragraphs [had] . . . been entered into between two enterprises for the purpose of resale.[49]

As of March 31, 1965, 36,322 agreements had been notified or had sought negative clearances.[50] Some 11,628 of these agreements had been notified on Form B-1.[51]

As the number of notified exclusive dealing agreements increased and as the Commission gained more experience with this type of agreement, the Commission announced its intention to grant exemptions

---

45 Regulation 17, art. 2, 1 CCH COMM. MKT. REP. ¶ 2411 (1968).

46 *See generally* Schwartz, *The Common Market Antitrust Laws and American Business*, 1965 U. ILL. L.F. 617, 637-42.

47 Although the national courts may apply article 85(1) to an agreement if the Commission has not initiated a proceeding with respect to the agreement (Regulation 17, art. 9(1), 1 CCH COMM. MKT. REP. ¶ 2481 (1968)), the Commission is the only institution with the power to apply article 85(3). Regulation 17, art. 9(1), 1 CCH COMM. MKT. REP. ¶ 2481 (1968). Thus, if the parties wish to obtain the benefit of article 85(3), they must, in most cases, notify their agreement to the Commission. 1 CCH COMM. MKT. REP. ¶¶ 2651-57 (1968).

48 Commission Regulation 153, 1 CCH COMM. MKT. REP. ¶¶ 2694-96 (1968). *See id.* ¶ 2655.01.

49 Regulation 153, art. 1, *quoted in* STEIN & HAY, *supra* note 1, at 156.

50 Schwartz, *supra* note 46, at 638 n.100.

51 *Id.*

for certain groups of agreements.[52] The member states objected upon the basis that the Commission could not grant group exemptions without the authorization of the Council.[53] In fact, the power of the Council to authorize the grant of exemptions by group was subject to some doubt and was not definitely settled until the Court of Justice upheld that power of the Council in its decision in the *Italy* case.[54]

The Commission deferred to the objections and requested the Council to take the requisite action. The Council responded to the request by the enactment of regulation 19[55] authorizing the Commission to grant group exemptions for certain types of agreements. The Commission exercised this power by the issuance of regulation 67/67.[56]

Basically, regulation 67/67 applies to the type of agreement that was to be notified upon Form B-1; in fact, regulation 67/67 renders Form B-1 obsolete.[57] Thus, regulation 67/67 declares the prohibition of article 85(1) to be inapplicable until December 31, 1972 to

> agreements in which only two enterprises take part and in which:
> (a) one of the parties agrees to deliver certain products only to the other party for resale within a specified area in the Common Market, or
> (b) one of the parties agrees to purchase for resale certain products only from the other party, or
> (c) exclusive supply and purchase for resale agreements within the meaning of subparagraphs (a) and (b) have been concluded between the two parties.[58]

The agreements of the type described above may include clauses that require the dealer not to sell goods competitive with contract goods and not to advertise or sell the goods outside the contract territory.[59] In addition, the dealer may be required to purchase complete product lines or minimum quantities, to sell the contract goods under the trademarks or packaging prescribed by the manufacturer, and to undertake sales promotion activities including advertising, customer and guarantee service, the maintenance of a sales network or stock, and the employment of specially trained personnel.[60] However,

---

52 Kelleher, *The Common Market Antitrust Laws: The First Ten Years*, 12 ANTITRUST BULL. 1219, 1228 (1967).

53 *Id.*

54 *See* note 17 *supra.*

55 1 CCH COMM. MKT. REP. ¶¶ 2717-25 (1965).

56 *Id.* ¶¶ 2727-27J.

57 *Id.* ¶ 2727G, (Reg. 67/67, art 7(1)).

58 *Id.* ¶ 2727A, (Reg. 67/67, art. 1).

59 *Id.* ¶ 2727B, (Reg. 67/67 art. 2(1)).

60 *Id.* (Reg. 67/67, art. 2(2)).

the agreement must not involve the employment of industrial property rights or other rights to prevent dealers or consumers from obtaining the contract goods from sources outside the contract territory or to prevent them from selling the goods in the contract territory.[61]

III

THE APPLICATION OF ARTICLE 85 TO EXCLUSIVE DEALING AGREEMENTS

A. *Article 85(1)*

Because article 85(3) is not relevant unless and until the agreement is found to violate article 85(1),[62] it is necessary to discuss briefly the application of the latter article to exclusive dealing agreements.

An exclusive sales agreement can have important effects upon the effort to integrate separate national markets. If private sellers were to be permitted to allocate exclusive territories upon the basis of national boundaries, the effect of eliminating state barriers to trade would be nullified. However, the effect may be to further economic integration if the offer of an exclusive sales agreement enables sellers in one national market to obtain dealers in another, hitherto unexplored, national market. Without indigenous dealers in another national market, legal, cultural, and linguistic differences between nations may effectively prevent or severely hamper a seller's attempt to penetrate the new market even after state barriers have been removed.

An exclusive purchase contract may also have important effects upon the economic integration of formerly separate national markets. For example, sellers located within a particular national market may have all of the dealers in the most desirable locations tied to them by means of exclusive purchase agreements. In this situation, it would be difficult for sellers located in other national markets to penetrate the local market, thereby effectively nullifying the elimination of state barriers to trade.[63] However, exclusive purchase agreements may, in some circumstances, further integration. Assume a product produced and sold by a seller in one national market. Assume further that this product is very desirable and that prior to the elimination of state barriers to trade this product was not extensively sold in other na-

---

61 *Id.* ¶ 2727C (Reg. 67/67, art. 3(b)).

62 Italy v. EEC Council & EEC Comm'n, 1961-66 CCH COMM. MKT. REP. ¶ 8048, at 7718 (EEC Ct. Just. 1966). A group exemption may include within its terms agreements which do not violate article 85(1), however. *Id.*

63 *See* S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen, 2 CCH COMM. MKT. REP. ¶ 8053, at 7808 (EEC Ct. Just. 1967) (Conclusions of Adv. Gen'l Roemer).

tional markets. Dealers in the other national markets may be required to offer exclusive purchase contracts to the seller in order to induce him to sell his product in their markets. If this is so, the exclusive purchase contracts may exert a beneficial effect upon economic integration in that they result in increased competition in the dealers' national markets.

The EEC Court of Justice has also recognized the ambivalent nature of exclusive sales agreements and held, in *Société Technique Minière v. Maschinenbau Ulm G.m.b.H.*,[64] that where these agreements are likely to affect trade between member states, their validity depends upon "the circumstances in the particular case."[65] That is, exclusive sales agreements do "not automatically come under the prohibition of Article 85, Paragraph 1."[66] Rather, the validity of this type of agreement depends upon an appraisal of such factors as

> the nature of the products and whether or not their quantity was limited, the position and importance of the licensor and licensee on the market of the products concerned, whether the contract is isolated or is one of a group of contracts, and whether the clauses protecting the exclusiveness are rigid or possibilities are left open for other channels of trade in the same products through re-exports and parallel imports.[67]

Thus, the Court did not adopt a per se prohibition but instead recognized that each agreement must be appraised on a case-by-case basis.[68]

The Commission, in the 1966 *Jallatte*[69] decision, held that an exclusive purchase agreement was prohibited by article 85, paragraph 1 because this type of agreement impairs the ability of other sellers to penetrate the purchaser's market. However, it should be noted that an exclusive purchase clause was contained in the agreement examined by the Court of Justice in *Société Technique Minière*. Although the Court did not specifically concern itself with the exclusive purchase clause apart from the agreement as a whole, at least one commentator is of the opinion that the portion of the opinion quoted above is applicable to the exclusive purchase clause and that, therefore, the validity of such a clause "depends upon its economic effect in the market."[70]

---

64 Société Technique Minière v. Maschinenbau Ulm G.m.b.H., 1961-66 CCH COMM. MKT. REP. ¶ 8047 (EEC Ct. Just. 1966).

65 *Id.* at 7695.

66 *Id.*

67 *Id.* at 7696.

68 *Cf.* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967).

69 Decision of the Comm'n on Jallatte Agreements, 2 CCH COMM. MKT. REP. ¶ 9083 (EEC Comm'n 1965).

70 Kelleher, *supra* note 52, at 1244.

Although this opinion is supported by the position taken by the Advocate General in *Société Technique Minière*,[71] it is possible to contend that if the prime consideration is the effect upon economic integration, exclusive sales agreements and exclusive purchase agreements should be treated differently. Due to the linguistic, cultural, and legal differences remaining after the removal of state barriers to trade, it is apparent that sellers may have difficulty in penetrating other national markets from which they were formerly barred. It would be easier for them to penetrate these new markets if they could rely upon established dealers who are accustomed to doing business in the markets. However, these dealers may be hesitant to assume the risks involved in introducing new products into their markets[72] and may demand exclusive sales agreements as the "price" for assuming the burdens of introducing new products into their markets. If abuses are controlled, the beneficial effect upon integration of permitting some exclusive sales agreements may be significant.

The case for the beneficial effect of exclusive purchase agreements appears less substantial. Virtually the only situation in which this type of agreement exerts a beneficial effect upon integration is the situation in which a dealer in one national market is required to offer an exclusive purchase agreement to a seller located in another national market in order to induce the latter to sell the goods in the former's market. The number of instances in which this would be the case, compared to the number of instances in which a seller is required to offer an exclusive sales agreement in order to locate outlets, appears to be small. If a seller desires to maximize profits, he will presumably desire to enter new markets (especially if the expansion in production will permit him to take advantage of economies of scale) without requiring the inducement of an exclusive purchase agreement. If, then, an exclusive purchase agreement is concluded, it is far more likely that it was concluded due to the demand of the seller rather than the result of an offer by the purchaser. Indeed, if the seller's product is desirable, as assumed above, this is even more likely since this would give the seller some degree of market power.

In addition, an exclusive purchase agreement may have detrimental effects upon integration. For example, a seller in national market *A* may conclude a number of exclusive purchase contracts with purchasers in national market *B*. These contracts may prevent a seller in national market *C* from penetrating national market *B*. Given: (*a*)

---

71 Société Technique Minière v. Maschinenbau Ulm G.m.b.H., 1961-66 CCH COMM. MKT. REP. ¶ 8047, at 7702 (1966) (Conclusions of Adv. Gen'l Roemer).

72 *See* p. 382 *supra*.

The presumed desire on the part of the seller to enter new markets; (*b*) the fact that because of the desirability of his product, the seller in national market *A* would have little or no difficulty in locating a dealer in national market *B*; (*c*) the possible prevention of the penetration of market *B* by sellers in market *C*; and (*d*) the fact that an exclusive sales contract does not necessarily affect the ability of the seller in market *C* to penetrate market *B* (since the same dealer may carry the goods of sellers located in market *A* and in market *C*), exclusive purchase agreements should be treated more severely than exclusive sales agreements.

B. *Article 85(3)*

1. *In General*

a. "*[I]mprovement of the production or distribution . . . and promotion of technological or economic progress . . . .*"[73] The Court of Justice has decided only one case involving an interpretation of the first requirement of article 85(3). *Consten & Grundig v. EEC Commission*[74] involved an exclusive sales agreement between Grundig, a German manufacturer, and Consten, a French distributor. The terms of the contract required Consten to refrain from vending goods competitive with those manufactured by Grundig; to advertise adequately and sufficiently; to establish a repair shop stocking a sufficient supply of replacement parts; to provide "faultless" customer service; and to submit binding orders from six to eight months in advance of the time of delivery by Grundig. Grundig agreed to refrain from selling the contract goods, directly or indirectly, to persons other than Consten located within the contract territory assigned to Consten. This obligation assumed by Grundig was supported by Grundig's distributional system which required all Grundig purchasers to refrain from exporting or re-exporting.

---

73 Promotion of economic progress can be "described as a vague catch-all which would probably be difficult to plead and prove and which largely overlaps the first category [improvement of production and distribution]." Patricelli, *supra* note 35, at 43. It will not be considered separately.

Clearly this first requirement covers services as well as goods and potential as well as actual improvements. The improvement must be of more than a de minimis nature, and there must be a causal connection between the agreement and the improvement. *See generally id.* at 53-55.

It is less clear whether the Commission may take into account the fact that the agreement violates some other provision of the treaty in applying article 85(3). *See id.* at 47-50.

Apparently, in applying article 85(3), the Commission should apply a "balance sheet" approach, *i.e.*, should weigh the total value of the improvements against the detrimental effects. *Id.* at 51.

74 1961-66 CCH COMM. MKT. REP. ¶ 8046 (EEC Ct. Just. 1966).

Previous decisions[75] of the Commission had indicated that an exclusive sales agreement between two firms located in different member states that prevented the manufacturer from delivering the contract goods directly to anyone but the exclusive dealer located within the contract territory was sufficient, in and of itself, to cause the agreement to result in at least a theoretical restriction, distortion, or prevention of competition. And this was held sufficient to cause the agreement to come within the prohibition of article 85(1). In addition, these decisions had indicated that exclusive dealing agreements that did not offer some form of reinforced territorial protection to the dealer could be granted an exemption pursuant to article 85(3).[76] Thus, the important feature of the Commission decision in *Grundig-Consten*[77] involves the treatment of the parties' contention that: (*1*) Consten's obligations to advertise, to provide customer service, and to place orders in advance, resulted in an improvement of production and distribution; and (*2*) the reinforced territorial protection granted to Consten was "indispensable" to the achievement of these improvements.

Previous decisions of the Commission had indicated that exclusive dealing agreements that did not contain reinforced territorial protection could result in improvements of distribution and production. For example, in *D.R.U.-Blondel,*[78] the Commission noted:

> Having a licensee assures that the products under contract are offered regularly and more easily on the French market by making it possible to overcome difficulties due to distance and to linguistic, legal, and other differences between the country of production and the country of distribution.[79]

Similarly, in *Grundig-Consten,* the Commission noted that:

> The sole-agency system can lead to an improvement in the production and distribution of the products. This may also be true with respect to the organization of a post-sale and guarantee service and to the advance planning which a sole agent must engage in, but not with respect to advertising, because the fact that Consten undertook the advertising does not have any bearing on the im-

---

75 Decision of the Comm'n on D.R.U.-Blondel Agreement, 2 CCH COMM. MKT. REP. ¶ 9049 (EEC Comm'n 1965); Decision of the Comm'n on Hummel-Isbecque Agreement, 2 CCH COMM. MKT. REP. ¶ 9063 (EEC Comm'n 1965); Decision of the Comm'n on Jallatte Agreements, 2 CCH COMM. MKT. REP. ¶ 9083 (EEC Comm'n 1965).

76 Cases cited note 75 *supra.*

77 Decision of the Comm'n on Grundig-Consten Agreement, 1 CCH COMM. MKT. REP. ¶ 2743 (EEC Comm'n 1962).

78 2 CCH COMM. MKT. REP. ¶ 9049 (EEC Comm'n 1965).

79 *Id.* at 8099.

provement of distribution, but only on the sharing of costs between the parties to the contract.[80]

However, the Commission's decision in *Grundig-Consten* does not contain a detailed discussion of the first requirement of article 85(3). Instead, the Commission assumed an improvement of production[81] and distribution and proceeded to base its decision upon the failure of the agreement to provide consumers with a fair share of the profit[82] and, especially, upon the finding that the reinforced territorial protection granted to Consten was not "indispensable" to the achievement of the improvements.[83]

In the course of affirming the decision of the Commission, the Court of Justice commented upon the nature of the requirement. The Court noted that

> not every advantage derived from [an] agreement . . . can be considered . . . an improvement [within the meaning of article 85(3)]. . . . [A] subjective method, which [would define] the idea of "improvement" according to the peculiarities of the contractual relationship in issue, would not be in keeping with the objectives of Article 85. Furthermore, the very fact that the Treaty provides that the limitation of competition must be "essential" for the improvement in question clearly shows how important that improvement must be. That improvement must, in particular, offer substantial objective advantages that are capable of compensating for the detriment to competition that it engenders.[84]

It is difficult to ascertain the meaning of the Court's distinction between "objective" and "subjective" improvements. Possibly the Court was referring to the Commission's reference to the fact that Consten's assumption of advertising costs did not lead to an "improvement" but was solely concerned with the allocation of costs between Consten and Grundig.[85] However, the Court may have meant much more than this.

The Court noted in the course of its discussion of article 85(3):

> In evaluating the relative importance of the various parts of

---

80 1 CCH COMM. MKT. REP. ¶ 2743 at 1865. Advocate General Roemer was of the opinion that the Commission should not have disregarded the improvement resulting from Consten's obligation to advertise. 1961-66 CCH COMM. MKT. REP. ¶ 8046, at 7674 (1966) (Conclusions of Adv. Gen'l Roemer).

81 The Commission may have assumed this in order to simplify the investigation. *See* Patricelli, *supra* note 35, at 51.

82 1 CCH COMM. MKT. REP. ¶ 2743, at 1866.

83 *Id.* at 1866-68.

84 1961-66 CCH COMM. MKT. REP. ¶ 8046, at 7655.

85 1 CCH COMM. MKT. REP. ¶ 2743, at 1865.

> the agreement, the Commission also had to evaluate their effect in relation to an objectively ascertainable improvement in the production and distribution of the products and to determine whether the resulting advantage was enough to make the restrictions on competition appear essential.[86]

It appears that the Court has adopted the position that the drafters of the treaty strongly believed that the primary, if not the *only*, manner in which the Community could achieve its goals is by the complete elimination of all barriers to trade between the member states. The Court appears to have adopted a position that focuses upon the elimination of these barriers,[87] and it may be of the opinion that if all present barriers to trade are eliminated and the erection of new barriers is prevented, the achievement of the goals of the Community will follow ipso facto.

If this does represent the present reasoning of the Court, article 85(1) should be strictly enforced; if new barriers to trade between the members are erected by private action, a common market—essential to the accomplishment of the goals of the Community—will not be established. If article 85(1) prohibits (at least primarily) agreements

---

86 1961-66 CCH COMM. MKT. REP. ¶ 8046, at 7656.

87 In *Grundig*, the Court noted:

> An agreement between producer and distributor that is designed to restore the national partitious in trade between Member States could conflict with the basic objectives of the Community. The EEC Treaty, whose preamble and text are designed to remove the barriers between the States and which, in a number of its provisions, strongly combats their reappearance, cannot permit enterprises to create new barriers of this type.

Id. at 7651. The Court's statement appears in the context of its consideration of an exclusive dealing agreement that defined the contract territory according to national boundaries and that contained absolute territorial protection. However, in *Société Technique Minière*, the Court noted:

> [I]n order to determine whether a contract containing a clause "granting an exclusive selliug right" falls within the field of application of Article 85, it is necessary to know whether it is capable of partitioning the market in certain products between the Member States and of thus rendering the economic interpenetration sought by the Treaty more difficult.

1961-66 CCH COMM. MKT. REP. ¶ 8047, at 7696. The special circumstances involved in *Grundig* were not present in *Société Technique Minière*.

See also S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen, 2 CCH COMM. MKT. REP. ¶ 8053 (EEC Ct. Just. 1967):

> [D]istortion of competition is governed by the Community prohibitions only in so far as the agreemeuts, decisions, or practices can impair trade between Member States. To fulfill that condition, an agreement, decision, or practice must, on the basis of all the objective elements of law or of fact, lead to the belief that it may exercise a direct or indirect infiuence on the flow of trade between Member States, contribute to a partitioning of the market, and make it more difficult to achieve the economic interpenetration intended by the Treaty.

Id. at 7804.

that erect barriers to trade between the member states; article 85(3), providing exemptions, permits the erection of barriers to that trade. Given the fact that if barriers are permitted, a common market will not be established, and that if a common market is not established, the Community may (or will) not accomplish its objectives, article 85(3) must be interpreted narrowly.

If this interpretation of the Court's position is correct, it may be contended that the Court's interpretation fails to embrace all of the treaty's goals. One of the prime goals of the treaty is the more efficient allocation of the resources possessed by the member states. Removal of barriers to trade erected by state or private action is a necessary but not a sufficient condition for the achievement of this goal.

If resources are to be allocated by market forces, they will be allocated efficiently only if competition is preserved. To ensure the preservation of competition it may prove necessary to prohibit agreements that restrict competition but that do not prevent the formation of a common market.

If the Court were to adopt a more liberal interpretation of article 85(1) based upon the premise that the article was designed to permit the free play of competition to ensure the efficient allocation of resources, the Court's interpretation of article 85(3) should also change. If the goal of the Community is a more efficient allocation of resources, then article 85(3) should be interpreted as permitting those agreements that result in some substantial improvement in the allocation of resources despite the fact that they result in some derogation from the theory of "pure" competition.

b. "[*W*]*hile reserving to consumers an equitable share in the profit* . . . ." Although there has been no Court of Justice decision interpreting this requirement, there have been several Commission decisions on this point.[88] Clearly "profit" means more than lower prices.[89] In two decisions, the Commission indicated that consumers benefited from the exclusive agreements involved "because [the agreements made it] . . . easier for them to obtain foreign-made products adapted to their habits that can be quickly delivered."[90]

However, the Commission noted:

> [T]he word "profit" must not be understood as meaning only improvement in the distribution of the products, which, if it leads

88 *See* decisions cited in note 75 *supra*.

89 Patricelli, *supra* note 35, at 59-60; Schwartz, *supra* note 48, at 631.

90 Decision of Comm'n on D.R.U.-Blondel Agreement, 2 CCH COMM. MKT. REP. ¶ 9049, at 8099 (EEC Comm'n 1965).

> to a broader choice or to greater purchasing possibilities, also benefits the consumers . . . . It also means other advantages resulting from rationalization; the consumers must also share in this, particularly with respect to prices and other conditions of sale.[91]

The Commission then proceeded to find that the substantial price differences between France and Germany made possible by absolute territorial protection precluded "consumers from being given a fair share of the profit resulting from the improvement alleged."[92]

The Commission apparently failed to consider, in *Grundig-Consten,* the fact that savings in costs due to an exclusive agreement may be passed on to the consumer in the form of increased services rather than in the form of lower prices and that the higher prices charged within the contract territory could be explained upon the basis that Consten was less efficient than other distributors rather than upon the basis that Consten's "absolute territorial protection" enabled it to extract exorbitant profits.[93] However, the decision can be read in another manner which would eliminate these difficulties.

In *D.R.U.-Blondel* and *Hummel-Isbecque,*[94] the Commission noted:

> An increase in prices compared to those charged in the country of origin does not appear to be economically possible, if only because of the preventive element provided by the possibility that the goods might be imported by other enterprises purchasing them from an intermediary located outside the contractual territory ("parallel imports"), which tends to maintain stability of prices.[95]

Thus, in *Grundig-Consten,* the Commission was not concerned with the difference in prices per se. Rather, the Commission was apparently concerned with the possibility that Consten was in fact more efficient than its higher prices indicated *and* that, due to the impossibility of parallel imports, there was no assurance that competition in the contract goods would force Consten to pass the benefits of increased efficiency (resulting from the exclusive agreement) on to consumers.[96]

---

91 1 CCH COMM. MKT. REP. ¶ 2743, at 1865-66.

92 *Id.* at 1866.

93 Patricelli, *supra* note 35, at 61.

94 Decision of Comm'n on Hummel-Isbecque Agreement, 2 CCH COMM. MKT. REP. ¶ 9063 (EEC Comm'n 1965).

95 *Id.* at 8099.

96 Patricelli, *supra* note 35, at 61-62. The Commission has thus given the "fair share" requirement a separate function. Presumably, the Commission could have considered the question of whether the agreement permitted the parties to charge higher prices in its consideration of the "improvement" requirement. However, it has chosen to consider this factor in its consideration of the "fair share" requirement and has thus given the latter a separate function from that performed by the "improvement" requirement. *Id.* at 62.

c. "[*Agreement must not*] *impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives . . .*." The Commission's interpretation of this requirement appears to vary in direct response to the "seriousness of the anti-competitive effects."[97] Thus, in *D.R.U.-Blondel,* the Commission stated that the improvements resulting from an exclusive sales agreement

> could not have been obtained otherwise than through a restriction of competition, namely through the granting of an exclusive license, which can at present be considered as absolutely necessary to create such advantages. The facts known to the Commission lead to the conclusion that, in this particular case, it would have been impossible to *further improve* distribution by another sales system.[98]

However, in the *Faience Convention*[99] recommendation disapproving, for lack of the requisite indispensability, a minimum stock requirement contained in an arrangement of reciprocal exclusivity between groups of buyers and sellers, the Commission noted:

> The application of paragraph 3 of Article 85 presupposes that it would be absolutely impossible to achieve the positive objectives mentioned—or at any rate that their achievement would not be absolutely certain . . . .[100]

And, in *Grundig-Consten,* the Commission, in refusing an exemption for the absolute territorial protection granted to Consten, noted:

> If, through a relaxation of territorial protection, the goal of improving production and distribution of the goods could no longer be attained, then absolute territorial protection would be indispensable. If, however, even under these conditions, improvement of production and of distribution of the goods were still possible, absolute territorial protection would not be indispensable.[101]

---

97 Schwartz, *supra* note 46, at 634.

The restriction of competition must be a restriction prohibited by article 85(1) and must not, for example, restrict competition only in third countries. Patricelli, *supra* note 35, at 64.

98 2 CCH COMM. MKT. REP. ¶ 9049, at 8099 (emphasis added).

99 Commission Recommendation On Application of Treaty Article 85 ("Faience Convention"), 1 CCH COMM. MKT. REP. ¶ 2741 (1965).

100 *Id.* at 1857.

101 1 CCH COMM. MKT. REP. ¶ 2743, at 1866. *Cf.* White Motor Co. v. United States, 372 U.S. 253 (1963):

> Another pertinent inquiry would explore the availability of less restrictive alternatives. In the present case, for example, as the Government suggests, it may appear at the trial that whatever legitimate business needs White advances for territorial limitations could be adequately served, with less damage to competition, through other devices . . . .

Id. at 271 (Brennan, J., concurring).

The portion of the Commission's decision quoted in the text raises the question of

In its decision prior to the decision of the Court of Justice in *Grundig*, the Commission followed the practice of examining each alleged improvement to determine whether or not the restriction of competition was indispensable.[102] If the restriction involved was not indispensable for any one of the alleged improvements, the entire agreement would be denied an exemption.[103] The Commission could, however, enjoin only those practices that it found objectionable, thereby indicating to the parties the manner in which they could modify the agreement in order to come within the exemption of article 85(3).[104]

Although the Court of Justice approved the Commission's practice of examining each alleged improvement separately,[105] the Court disapproved of the Commission's denial of an exemption to the entire agreement if the restriction of competition was not indispensable to the achievement of any one improvement.[106] This would appear to be a desirable result. Under the Commission's practice, the parties were required either to abandon the agreement or modify it as indicated by the Commission. If they chose to modify, presumably the parties were

whether the agreement would have failed to fulfill the requirements of article 85(3), if, without absolute territorial protection, it would not have been possible to improve distribution and production to the same degree as was possible with absolute territorial protection. In *Grundig*, Advocate General Roemer noted:

> [I]t must be emphasized . . . that the sole criterion [of indispensability] can only be whether without the clause providing territorial protection it would be possible to achieve in the same way, to the same extent, and with the same intensity exactly those improvements that can be achieved by the . . . contract and that are recognized as useful and deserving protection from an over-all economic viewpoint.

1961-66 CCH COMM. MKT. REP. ¶ 8046, at 7677.

102 *See* Decision of the Commission on Grundig-Consten Agreement, 1 CCH COMM. MKT. REP. ¶ 2743 (EEC Comm'n 1965):

The practice of examining each alleged improvement *seriatim* can lead to a problem of circularity. In *Grundig-Consten*, the Commission assumed an improvement of distribution, *see* text at note 82 *supra*, and then proceeded to determine whether the restriction was indispensable to each alleged improvement.

Assume the Commission had found that the restriction was in fact indispensable. The Commission would then be presented with the problem of determining whether or not the agreement did in fact lead to an improvement. Assume that in answering this question, the Commission applies a "balancing" test and finds that on the whole, the agreement leads to an improvement. Must the Commission now return to the "indispensability" requirement in order to determine whether the restriction is required in order to achieve the net improvement? *See* Patricelli, *supra* note 35, at 51.

The Commission did not appear to examine the agreement to determine whether the restriction was indispensable to ensure that consumers received a fair share of the profit. For the argument that the Commission should have done this, see *id.* at 66.

103 *See* 1 CCH COMM. MKT. REP. ¶ 2743, at 1868.

104 *See id.* at 1868-96.

105 *See* 1961-66 CCH COMM. MKT. REP. ¶ 8046, at 7655-57.

106 *Id.* at 7653-54.

required to notify the Commission of the agreement as modified and to request an exemption or a negative clearance.[107] This procedure would be unnecessary if, in one proceeding, the Commission could indicate those provisions of the agreement that, if eliminated, would permit the exemption of the remainder.

In *Grundig*, the Court held that absolute territorial protection was not indispensable to advance planning, guarantee and customer service, maximum exploitation of the market, and the conduct of market surveys. In rejecting the parties' contention that without territorial protection Consten would not undertake the costs of promotion (leading to less than the maximum exploitation of the markets), the Court stated:

> [T]he plaintiffs' argument would in essence be tantamount to asserting that without absolute territorial protection the sole distributor would not have accepted the conditions agreed to. This circumstance, however, has no relationship to the improvements of distribution mentioned in Article 85, paragraph 3.[108]

It is submitted that this portion of the opinion should be read in the context of the facts of the case before the Court. Angelo Reati, a member of the Directorate General for Competition of the EEC Commission has noted,[109] as discussed above,[110] that some form of territorial protection may serve to promote competition in some circumstances (particularly where a small to medium firm is attempting to introduce a new product into a new market where there is lively inter-brand competition). Thus, the statement of the Court noted above should be read as prohibiting only absolute territorial protection for an unlimited period granted by a large established manufacturer to a large (or, at least, established) dealer.

d. "*[Agreement must not] . . . enable [the concerns in question] . . . to eliminate competition in respect of a substantial proportion of the goods concerned.*" Since this requirement appears to indicate that certain effects of an agreement on the market will not be tolerated no matter how great the improvements of distribution or production, paragraph (b) of article 85(3) "is crucial in the exemption scheme."[111] The Commission's discussion of this requirement has been less than complete however. For example, in *Hummel-Isbecque*, the Commission confined its discussion to the following observations:

---

107 *See* pp. 388-89 *supra*.

108 1961-66 CCH COMM. MKT. REP. ¶ 8046, at 7656.

109 *See* Reati, *supra* note 6, at 139-46.

110 *See* p. 382 *supra*.

111 Patricelli, *supra* note 35, at 67.

> The Hummel products are in direct competition with similar products offered for sale in Belgium both by Isbecque and by other enterprises. Furthermore, Isbecque, in its capacity as exclusive dealer, does not have absolute territorial protection; consequently, the agreement does not enable the enterprises concerned to eliminate competition in respect of a substantial part of the goods concerned.[112]

Thus, the official statements of the Commission prior to regulation 67/67[113] offer little aid in an attempt to interpret this requirement.[114]

Regulation 67/67 does not serve to change the situation to any great extent. The regulation notes:

> Since competition at the distribution stage is ensured by the possibility of parallel imports, the exclusive dealing agreements subject to this regulation will not, as a rule, make it possible to eliminate competition for a substantial part of the products concerned.[115]

The quoted portion of the regulation appears to indicate that "eliminate competition for a substantial part of the goods concerned" refers, at the very least, to the ability of the parties to eliminate intrabrand competition. This interpretation would be consistent with the interpretation offered by Advocate General Roemer in the *Geitling*[116] case decided under article 65(2)(c) of the ECSC Treaty:

> Article 85 is aimed not at the aggregate effect of the cartel agreement on the market, but at the exclusion of competition *between the parties to the agreement themselves,* that is, at what the applicants called the "internal effect of the agreement".[117]

However, regulation 67/67 also notes that the Commission will examine a specific agreement that apparently comes within the terms of the group exemption if there is reason to suspect a lack of vigorous inter-brand competition.[118] This provision is particularly important with respect to the potential anti-competitive effects of exclusive purchase agreements[119] and is apparently in accord with the Court's deci-

---

112 2 CCH COMM. MKT. REP. ¶ 9063, at 8139.

113 1 CCH COMM. MKT. REP. ¶¶ 2727-27J (1967).

114 This requirement probably prevents any agreement constituting "an abuse of a dominant position" from obtaining an exemption. Patricelli, *supra* note 35, at 50. This requirement is also apparently directed at potential as well as actual ability to eliminate competition. *Id.* at 68. As to the term "substantial part," see *id.* at 73.

115 1 CCH COMM. MKT. REP. ¶ 2727, at 1820.

116 "Geitling" Ruhrkohlen-Verkaufsgesellschaft m.b.H. v. High Auth., 1 Comm. Mkt. L.R. 113 (EEC Ct. Just. 1962).

117 *Id.* at 127 (emphasis in original).

118 Regulation 67/67, arts. 6(a), (b), 1 CCH COMM. MKT. REP. ¶ 2727F (1967).

119 *See* p. 381 *supra.*

sion in *Geitling*[120] and the Court's decision concerning article 85(1) in *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen.*[121]

2. *Regulation 67/67*

Regulation 67/67[122] *appears* to be consistent with the interpretations of article 85(3) noted in section III. The regulation notes that exclusive dealing agreements result in an improvement in distribution because:

> [A]n enterprise can concentrate its selling activities, is not obliged to maintain a multiplicity of business ties with a large number of dealers, and, since it deals with only a single dealer, can more easily overcome the marketing difficulties resulting from linguistic, legal, or other differences. Exclusive dealing agreements facilitate the sales promotion of a product and make possible a more intensive exploitation of the market and a continuous supply while at the same time rationalizing distribution.[123]

In addition, the regulation notes that consumers receive a fair share of the profit "since they can obtain goods manufactured in other countries more quickly and more conveniently."[124] The regulation also appears[125] to recognize the "indispensability" of exclusive agreements by noting that "the designation of an exclusive dealer or of an exclusive purchaser who assumes the sales promotion, customer service, and maintenance of stocks for the producer is often the only way small and medium-size enterprises can enter the market as competitors."[126] Finally, the regulation states that since the agreements covered by regulation 67/67 may not prevent parallel imports, the agreements will not "make it possible to eliminate competition for a substantial part of the products concerned."[127]

The Court of Justice, in the *Italy* case[128] indicated that a group

120 "Geitling" Ruhrkohlen-Verkaufsgesellschaft m.b.H. v. High Auth., 1 Comm. Mkt. L.R. 113 (EEC Ct. Just. 1962).

121 2 CCH COMM. MKT. REP. ¶ 8053 (EEC Ct. Just. 1967).

122 1 CCH COMM. MKT. REP. ¶¶ 2727-27J (1967).

123 *Id.* ¶ 2727, at 1819.

124 *Id.* at 1820.

125 One commentator is of the opinion that the Commission has "completely ignored" the requirement of indispensability in regulation 67/67. Kelleher, *supra* note 53, at 1240. It does seem clear that the Commission has had difficulty with the requirements set forth in article 85(3). *Cf.* Ladas, *Exclusive Distribution Agreements and the Common Market Antitrust Laws*, 9 ANTITRUST BULL. 761, 767 (1964).

126 1 CCH COMM. MKT. REP. ¶ 2727, at 1819.

127 *Id.* at 1820.

128 Italy v. EEC Council & EEC Comm'n, 1961-66 CCH COMM. MKT. REP. ¶ 8048 (EEC Ct. Just. 1966).

exemption is only a "framework" and that an agreement coming within the terms of this framework "need not because of this necessarily fulfill the conditions of [article 85] paragraph 1."[129] In light of the limitations contained in regulation 67/67 and the Court of Justice decisions interpreting article 85(1), one may question the need for regulation 67/67.

Regulation 67/67 provides that exclusive purchase and exclusive sales agreements are not within the terms of the regulation if the parties use industrial property rights or take other measures to restrict intra-brand competition.[130] In addition, the regulation indicates that the Commission will closely scrutinize any agreement apparently within the terms of the group exemption if it appears that the contract goods are not subject to inter-brand competition. In the case of exclusive purchase contracts, the agreement will be scrutinized if other manufacturers have difficulty in locating outlets for their goods, or if the contractual products are sold at excessive prices, or if the dealer refuses to deal with other dealers located within the contract territory who cannot obtain the goods elsewhere under reasonable conditions unless the dealer has "an objectively justifiable reason" for his refusal.[131]

The Court of Justice has indicated that the validity of exclusive agreements depends upon an analysis of a number of factors and that this type of agreement is not automatically prohibited by article 85(1).[132] As noted above, the Court appeared to interpret article 85(1) as prohibiting only those agreements that affect the formation of a common market to more than a de minimis extent by erecting barriers to trade between the member states.[133] Given the fact that exclusive purchase and exclusive sales agreements can further the integration of formerly separate markets[134] and the fact that these agreements will possess the greatest anticompetitive effects primarily in those situations excluded from the complete exemption provided by regulation 67/67, the regulation seems to apply only to those agreements that hinder the formation of a common market to a de minimis extent. If this is so, most, if not all, of the agreements that come within the terms of regulation 67/67 are not prohibited by article 85(1).

Regulation 67/67 was issued after the decisions of the Court of Justice interpreting article 85(1). If the argument advanced in the

129 *Id.* at 7718.

130 Regulation 67/67, art. 3(b), 1 CCH COMM. MKT. REP. ¶ 2727C (1967).

131 Regulation 67/67, art. 6, 1 CCH COMM. MKT. REP. ¶ 2727F. (1967).

132 *See* p. 392 *supra.*

133 *See* p. 397 *supra.*

134 *See* p. 391 *supra.*

preceding paragraph is correct, why did the Commission bother to issue regulation 67/67?

As previously noted, by 1965 over 36,000 exclusive dealing agreements had been notified to the Commission,[135] and of these, 11,628 had been notified on Form B-1, the form that was rendered obsolete by regulation 67/67.[136] After the Court of Justice decisions, the Commission was faced with the alternatives of requesting the parties to these agreements to apply for a negative clearance,[137] issuing negative clearances without application by the parties, examining each agreement and issuing separate decisions granting exemptions[138] or issuing a group exemption (which, according to the *Italy* case,[139] would not necessarily create the impression that all of these agreements violated article 85(1)) with such qualifications as would permit the Commission to examine the possible denial of an exemption at its leisure without delaying a decision on a large number of clearly permissible agreements. The Commission, it is submitted, adopted the last alternative by issuing regulation 67/67.

CONCLUSION

In light of the importance of eliminating present barriers to trade and of preventing the establishment of new ones, the Court has decided that article 85(3) must be interpreted narrowly. Otherwise many barriers to trade would be permitted and the goals of the treaty might never be achieved.

Ultimately, the Court's interpretation may not prove sufficient. The experience of the United States indicates that the mere removal of state barriers to trade does not in itself ensure the proper functioning of market forces. It is also necessary to prohibit anti-competitive agreements that might not erect barriers to trade under the Court's current interpretation. The important consideration is the prevention of agreements that interfere with the operation of those market-forces that the removal of barriers to trade is designed to encourage.

If the Court were to adopt a broader interpretation of article 85(1), its interpretation of article 85(3) would also change. If article 85(1) were to be interpreted as prohibiting agreements that restrict

135 *See* Schwartz, *supra* note 47, at 638 n.100.

136 *Id.*

137 *See* pp. 388-89 *supra.*

138 *See* p. 389 *supra.*

139 Italy v. EEC Council & EEC Comm'n, 1961-66 CCH COMM. MKT. REP. ¶ 8048, at 7718 (EEC Ct. Just. 1966).

competition even if they do not erect barriers to trade between the member states, the Commission and the Court should then examine each practice that comes before them to determine whether in fact the practice will lead to a more efficient allocation of resources despite the fact that the practice interferes to some degree with the preservation of "pure" competition.

The Court's interpretation may be required by the language of the treaty and the limited jurisdiction granted to the Community institutions.[140] Also, at this early stage of development, it may be best for the Court to concentrate upon the removal of barriers to trade. Finally, the Court's interpretation might also be considered as resulting from the only types of cases it has been required to consider up to now. Only future cases and decisions will indicate whether the Court will interpret article 85 in a more sweeping manner.

---

140 One of the prime motives for the formation of the EEC was the hope that economic integration would ultimately "spill" over into political integration. *See* L. LINDBERG, THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION 9 (1963). This has not occurred to any great extent. In fact, in recent years, there has been a resurgence of nationalism and the member states appear to be increasingly jealous of their prerogatives as sovereign states (at least in the case of France). The Court has thus been faced with the problem of balancing the interests of the Community organs in ensuring the formation of a common market against the fear on the part of at least one member state of granting the Community increased powers to "interfere" in domestic affairs.

The Court may have solved this problem by interpreting article 85(1) so as to limit the Commission's jurisdiction to those types of practices that are of most direct concern to the Community, *i.e.*, those practices that interfere with the removal of barriers to trade between the member states. Other practices that may restrict, distort, or prevent competition are left to the jurisdiction of the individual member states.